

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DONNA DELOISE MOORE,	)	Case No. 10-2193 SC
	)	
Plaintiff,	)	MEMORANDUM OF DECISION,
	)	FINDINGS OF FACT AND
v.	)	<u>CONCLUSIONS OF LAW</u>
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
	)	
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**I. INTRODUCTION**

This case involves injuries Plaintiff Donna Moore ("Plaintiff or Moore") allegedly sustained to her shoulder and cervical spine when employed as a steward aboard a government owned freighter, the CAPE HORN, on December 30, 2008. ECF No. 1 ("Compl.") ¶ 6. Moore filed this suit against the United States of America ("Defendant" or "the United States") on May 20, 2010, asserting claims for unseaworthiness, negligence under the Jones Act, and unreasonable failure to provide prompt and adequate maintenance and cure. Id.

The Court held a six-day bench trial from September 6, 2011 through September 13, 2011. The Court, by this Memorandum of Decision, issues its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. For the reasons set forth below, the Court concludes that Plaintiff

1 has proven each of her claims by a preponderance of the evidence.

2  
3 **II. FINDINGS OF FACT**

4 **A. The Parties**

5 1. Plaintiff Donna Moore is a sixty-three year-old  
6 former Chief Steward and Cook who worked the majority of her life  
7 at sea, the last ten-plus years on merchant vessels owned by the  
8 United States Maritime Administration ("MARAD"). Moore Test. From  
9 2001 to 2008, she worked as the Chief Steward aboard a MARAD vessel  
10 named the CAPE GIRARDEAU, which was docked in Alameda, California  
11 on ready reserve status. Pl.'s Ex. 53; Moore Test. When the CAPE  
12 GIRARDEAU was "laid up" as no longer operational in July 2008,  
13 Moore began looking for work aboard another vessel. Moore Test.  
14 She began working as Chief Steward on the CAPE HORN on December 16,  
15 2008. Pl.'s Ex. 55-7. Moore was injured while working aboard the  
16 CAPE HORN on December 30, 2008. Moore Test. She suffered an  
17 aggravation of her injury on November 13, 2009, while working  
18 aboard the ALGOL. Id.

19 2. The United States was the owner of the CAPE HORN, a  
20 cargo vessel that was berthed in San Francisco on ready reserve  
21 status as of December 30, 2008. Moore Test.; Ryan Test.<sup>1</sup> The  
22 CAPE HORN was a "roll-on, roll-off" cargo vessel used primarily to  
23 transport military vehicles. Ryan Test. It was moored next to the  
24 CAPE HUDSON and was managed and operated by a private operator,  
25 Pacific Gulf Marine, Inc ("PGM"). Moore Test. The United States  
26 was also the owner of the ALGOL, a cargo vessel berthed in Alameda

27 \_\_\_\_\_  
28 <sup>1</sup> Henry Ryan ("Ryan"), MARAD's ship operations and maintenance  
officer for the west coast of the United States, testified as a  
defense witness.

1 and managed by Maersk Lines.<sup>2</sup>

2 **B. Conditions on the CAPE HORN**

3 3. While the CAPE HORN was in ready reserve status, it  
4 operated with a reduced crew of ten members. Moore Test. Moore's  
5 duties as Chief Steward included setting menus and preparing three  
6 meals per day for the crews of both the CAPE HORN and the CAPE  
7 HUDSON, a total of about twenty seamen. Id.

8 4. The dry storage area ("reefer room")<sup>3</sup> of the CAPE  
9 HORN was equipped with four rows of large floor-mounted, top-  
10 loading freezer boxes. Pl.'s Exs. 3-8. The freezers had heavy  
11 lids that needed to be held open with large hooks mounted on the  
12 ceiling behind each unit. Pl.'s Exs. 3-8. Each box was three  
13 feet, three inches tall and approximately two feet, four inches  
14 deep. Feitz Test.<sup>4</sup> The distance from the front edge of each  
15 freezer box to the latch for securing the lid in the open position  
16 was forty-five inches. Id.

17 5. As part of her duties as Chief Steward, Moore was  
18 required to open the freezer boxes several times per day to  
19 retrieve food products. Moore Test. Moore is five feet, two  
20 inches tall. Id. Due to her short height relative to the height  
21 of the freezer box, Moore needed to stand on something to elevate  
22 herself in order to reach down into the freezers. Id. In order to  
23 open the freezer lids far enough to latch them in the open

24 <sup>2</sup> The parties agreed to this fact.

25 <sup>3</sup> Defendant's expert witness Kim Estes ("Estes") explained to the  
26 Court that seamen refer to the refrigerated storage area as the  
27 "reefer room." The term "reefer" is derived from the abbreviation  
"Rfr." used to indicate that the area is refrigerated. Estes Test.

28 <sup>4</sup> Dale Fietz, a safety engineer, testified as one of Plaintiff's  
expert witnesses.

1 position, she needed to stand on something for elevation and to use  
2 an extension -- such as a piece of shelving or a broom handle -- to  
3 push the lid all the way into the latched position. Moore Test.

4           6. No step-ladders or stepping stools were located in  
5 the reefer room or the galley. Moore Test; Sharik Test. When  
6 Moore began working on the CAPE HORN, an empty plastic milk crate  
7 was present on the floor of each aisle of freezer boxes. Moore  
8 Test. She understood that these crates were to be used as stepping  
9 stools when accessing the boxes. Id.

10           7. The floor of the reefer room was made of hard  
11 ceramic tile. No rubber matting or non-skid stripping covered the  
12 tile. Pl.'s Ex. 10. Non-skid stripping was used in the galley  
13 room immediately adjacent to the reefer room. Pl.'s Ex. 16.  
14 Although non-skid stripping was not used in the reefer room on the  
15 CAPE HORN, non-skid stripping was used in the reefer room of the  
16 CAPE HUDSON, which in all other respects was identical to the  
17 reefer room on the CAPE HORN. Jahn Test.<sup>5</sup>

18           8. Frost and ice accumulated periodically along the  
19 bottom edge of the freezer boxes. Pl.'s Ex. 15. The frost and ice  
20 melted periodically, wetting the tile and making the floor more  
21 slippery. Moore Test.; Fietz Test.

22           9. Prior to her accident, Moore asked Jahn for a ladder  
23 or stool to use in the reefer room because she felt that standing  
24 atop a milk crate was unsafe.<sup>6</sup> Id. Jahn told her that there used

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25  
26 <sup>5</sup> Mark Jahn ("Jahn"), Chief Mate of the CAPE HUDSON, testified as a  
fact witness for Defendant.

27 <sup>6</sup> Moore lived aboard the CAPE HUDSON, which was moored alongside  
28 the CAPE HORN, because she found its cabins more to her liking.  
Because she lived aboard the CAPE HUDSON, she had more interaction

1 to be a ladder in the reefer room but it had been removed after  
2 someone fell off of it. Id. Moore understood from the  
3 conversation with Jahn that she should continue to use the milk  
4 crates to stand on when accessing the freezer boxes. Id. Moore  
5 also told Jahn that non-skid stripping was needed in the reefer  
6 room. Id. When her complaints were not addressed, she dropped the  
7 issue because she did not want to be perceived as a complainer  
8 during her first two weeks on the job. Id.

9           10. Moore's duties as Chief Steward did not include  
10 procuring safety equipment such as stepping stools or non-skid  
11 stripping. Moore Test; Stoller Test.<sup>7</sup>

12           11. PGM was required to obtain MARAD approval before  
13 performing major repair or maintenance projects. Ryan Test. By  
14 contrast, day-to-day preventive maintenance projects of low dollar  
15 value, including purchasing a stepping stool or installing non-skid  
16 stripping on the floor of a work space, could be undertaken without  
17 agency approval. Id.

18           12. The standard of care in the maritime industry calls  
19 for maritime employers to conduct job hazard analyses for certain  
20 tasks that are to be performed aboard their vessels. Stoller  
21 Test.; Stoller Rep. at 12. No job hazard analysis was ever  
22 conducted regarding the risks of not providing step-ladders in the  
23

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24 with Jahn than with the Chief Mate of the CAPE HORN, Christopher  
25 Sharik.

26 <sup>7</sup> Captain Mitchell Stoller ("Stoller"), a licensed Master with  
27 sixteen years of seagoing experience, who has served multiple  
28 appointments to federal maritime safety committees and is now a  
safety consultant to the maritime industry, testified as  
Plaintiff's expert on maritime safety. See Pl.'s Ex. 64 ("Stoller  
Rep.").

reefer room. Sharik Test. Sharik does not know whether any such analysis was ever performed regarding the lack of non-skid stripping or rubber mats in the reefer room. Id.

13. Dr. Dale Fietz ("Fietz"), Plaintiff's expert safety engineer, conducted tests to determine the coefficient of friction of the tile floor of the reefer room. Fietz Test.; Pl.'s Ex. 67 ("Fietz Rep."). A higher coefficient of friction indicates that a surface is more slip-resistant, while a lower value indicates that the surface is less slip-resistant. Fietz Test. The Tile Institute's recommended coefficient of friction for a tile floor is .60. Id. The floor of the reefer room had a coefficient of friction of .29 when dry and .17 when it became wet from the melting frost on the bottom of freezer units. Id.

14. Maritime industry standards provide for a minimum coefficient of friction for ship decks of .50. Stoller Test. The standard of care in the industry provides for the use of mats and non-skid stripping on slippery surfaces. Id. A ship's captain has the responsibility to ensure that all crew members are provided with the equipment necessary to perform their jobs safely. Id.

15. Crista Ali ("Ali") worked as a temporary Chief Steward on the CAPE HORN both before and after Moore's accident. Ali Test. She is five feet six inches tall. Id. When she worked on the CAPE HORN prior to Moore's accident, she requested a stepping stool but was not provided with one. Id. Lacking a stepping stool, she stood atop a plastic milk crate to reach into the bottom of the freezer boxes. Id. She also sometimes stood atop a milk crate to open the freezer lids. Id. Other times she stood on the floor and used the long handle of a scrub brush to

1 push the lid into the latched position. Id. Officers of the ship  
2 witnessed her standing atop milk crates and never told her to stop  
3 doing so. Id. On one occasion, a crate slipped out from under her  
4 as she was attempting to latch a freezer lid in the open position,  
5 causing her to bruise her rib cage on the edge of the freezer. Id.

6 **C. The Accident**

7 16. On December 30, 2008, the crews of the CAPE HORN and  
8 the adjacent CAPE HUDSON were preparing to move the contents of the  
9 freezers on the CAPE HORN to the CAPE HUDSON.<sup>8</sup> Moore Test. At 7  
10 a.m. that morning, before beginning the transfer, the Chief Mate,  
11 Christopher Sharik ("Sharik") conducted a daily safety meeting with  
12 the crew and discussed the potential risks of the project. Sharik  
13 Test. However, the meeting did not include any discussion of the  
14 slipperiness of the tiles or use of step ladders in the reefer  
15 room. Sharik Test.

16 17. The crew was going to move the contents of the  
17 freezer boxes from one ship to the other, and Sharik told Moore  
18 that she needed to instruct the crew where to move the various  
19 items. Id.; Sharik Test. Sharik testified that he instructed  
20 Moore not to move any of the items herself. Id. Moore testified  
21 that she did not recall this conversation, but that she would have  
22 understood such comments to mean she did not need to carry items  
23 from the CAPE HORN to the CAPE HUDSON. She would not have  
24 interpreted them to mean that she was prohibited from rummaging  
25 through the contents of the freezer boxes in order to determine

26  
27 <sup>8</sup> The crews periodically switched from preparing and eating meals  
28 on one ship to preparing and eating meals on the other in order to  
ensure that both galleys remained in a state of preparedness.  
Moore Test.

1 what was inside them, whether certain items needed to be thrown  
2 away, and where certain items should be stored once transferred to  
3 the CAPE HUDSON. Id. Moving the items in the freezer boxes  
4 around, to access items under them for example, was necessary for  
5 her to perform the inventory she had been asked to perform and was  
6 a regular part of her day-to-day duties. Id.

7 18. Moore's accident occurred when she was trying to  
8 open and latch one of the freezer units in order to determine its  
9 contents so that she could then instruct the crew members what to  
10 do with the items inside. Moore Test. In order to extend her  
11 reach sufficiently to latch the freezer lid, Moore stood atop an  
12 upside-down plastic milk crate and used a length of metal shelving  
13 to push the lid the forty-five inches required to latch it. Id.  
14 While Moore was attempting to latch the lid, the milk crate on  
15 which she was standing slipped on the hard tile deck, causing her  
16 to fall into the freezer and the heavy freezer lid to fall and  
17 strike her in the back of the neck and shoulder. Id. Moore was  
18 found in the freezer by Sharik, with only her legs protruding.  
19 Id.; Sharik Test.

20 **D. Plaintiff's Injuries**

21 19. When the freezer lid fell on Moore, it struck her  
22 across her upper back and neck, and caused her to fall into the  
23 freezer, striking her shoulder and then falling to her back. Moore  
24 Test. She immediately felt a stabbing pain in her right shoulder,  
25 and defuse pain in her upper back and neck. Id. Sharik  
26 immediately drove Moore to the emergency room at St. Mary's  
27 Hospital in San Francisco. Id.; Sharik Test.

28 20. At the emergency room Moore was treated by Dr.



1 Patrick Hand ("Hand"). Pl.'s Ex. 25 ("St. Mary's Med. Rep.").  
2 Moore provided the details of how her injury occurred, and Hand  
3 noted that she was "complaining of pain in her right shoulder,  
4 10/10 with movement, 6/10 when holding still." Id. Following an  
5 X-ray and CT scan, Moore was diagnosed with a "displaced fracture  
6 of the glenoid." Id. She was discharged with pain medication and  
7 a referral to orthopedic surgeon William Montgomery ("Montgomery").  
8 Id.

9           21. A day or two after her accident, Moore began  
10 experiencing periods of slight tingling in her fingertips. Moore  
11 Test. These "spells" did not occur every day, and Moore thought  
12 nothing of them at the time. Id. She had never experienced these  
13 symptoms before her accident. Id.

14           22. During her initial examination by Montgomery, the  
15 displaced fracture was confirmed, and Moore was told that she was  
16 going to need surgery. Pl.'s Ex. 26 ("Jan. 7, 2009 Letter").  
17 Montgomery informed her that she was not fit to continue working as  
18 a steward for the near-term. Moore Test. Moore therefore left her  
19 position as Chief Steward of the Cape Horn. Id.

20           23. On January 16, 2009, Montgomery performed  
21 arthroscopic surgery on Moore to address a "right shoulder  
22 displaced glenoid fracture, labral tear, and cuff tear." Pl.'s  
23 Ex. 27 ("Jan. 16, 2009 Operative Rep."). The surgery involved a  
24 suture of the labrum, cuff debridement, and fracture repair with  
25 screw fixation. Id.

26           24. After surgery, Moore began physical therapy to  
27 rehabilitate her shoulder. Moore Test. The therapy sessions  
28 caused the pain in her shoulder to steadily improve. Id. Her back

1 and neck continued to be tender, and she continued experiencing  
2 periodic tingling in her fingertips. Id. She wanted very badly to  
3 return to work as soon as possible and began asking her doctors to  
4 clear her to return to work. Id. In late February, her physical  
5 therapist noted that Moore reported that she wanted "to go back to  
6 work." Pl.'s Ex. 30. On March 25, 2009, Montgomery's assistant  
7 noted that Moore was "anxious to return to work." Pl.'s Ex. 31.  
8 On April 15, 2009, Montgomery released Moore to return to work  
9 without restrictions but noted that she would need to continue  
10 physical therapy for six more weeks. Pl.'s Ex. 32.

11 **E. The Non-Conformity Report**

12 25. On January 5, 2009, six days after Moore's accident,  
13 Chief Mate Sharik completed an investigation of the accident.  
14 Sharik Test. Upon completing his investigation, Sharik filled out  
15 a "Non-Conformity Report" and sent it to PGM. Sharik Test.; Pl.'s  
16 Ex. 24 ("Non-Conformity Rep.").

17 26. Under a section of the Non-Conformity Report  
18 entitled "Investigation and Findings," Sharik wrote: "A crew member  
19 of average height can stand on both feet and reach into the bottom  
20 of the box without leaving the deck. A smaller crew member has to  
21 stand on something to gain the height. A milk crate was used.  
22 When the angle of the Stwd's weight shifted the milk crate slipped  
23 from under her." Non-Conformity Rep.

24 27. Under a section entitled "Immediate Corrective  
25 Actions Taken," Sharik wrote: "Remove milk crates from thaw room. .  
26 . . A type of non-skid decking will have to be installed." Id.

27 28. Sharik testified that after the accident "we removed  
28 all the milk crates and we actually ordered big wide ergonomic step

1 ladders." Sharik Test.

2 29. On February 25, 2009, a PGM official sent a letter  
3 to the Chief Engineer of the CAPE HORN in response to the Non-  
4 Conformity Report. Pl.'s Ex. 24-3. The letter stated that step  
5 ladders should be procured to prevent a similar accident from  
6 occurring in the future. Id. No other corrective actions were  
7 recommended. Id.

8 30. Step ladders have since been placed in the reefer  
9 room. Sharik Test.; Ali Test; Pl.'s Ex. 11.

10 **F. Plaintiff's Return to Work**

11 31. On April 24, 2009, Moore began working as Chief  
12 Steward aboard the ALGOL, a cargo vessel berthed in Alameda and  
13 managed by Maersk Lines. Pl.'s Ex. 55-8. She continued to have  
14 problems with her shoulder and neck. Moore Test. In May of 2009,  
15 her physical therapist noted that she continued to have "mild" to  
16 "moderate difficulty" with various tasks, including opening jars,  
17 heavy household chores, and carrying objects weighing over 10  
18 pounds. Pl.'s Ex. 33. In July 2009, her physical therapist noted  
19 she was "extremely compliant," but she was still having "some mild  
20 restriction in shoulder range of motion." Pl.'s Ex. 34. She was  
21 able to complete her steward duties without "undue" symptoms of  
22 pain. Id. On September 17, 2009, Montgomery noted that Moore  
23 still suffered from decreased range of motion, and a marked  
24 reduction of grip strength in her injured and dominant right hand.  
25 Pl.'s Ex. 35.

26 32. Once working aboard the ALGOL, Moore continued  
27 having stiffness in her neck and began experiencing the numbness  
28 and tingling in her fingers more frequently. Moore Test. She also

1 began experiencing spasms in her hands at random intervals. Id.

2           33. At first, Moore thought the spasms and tingling  
3 might be an indicator that she was working too hard. Id. Her job  
4 as Chief Steward required lifting heavy pots and pans at times and  
5 was physically demanding. Id. However, her previous jobs aboard  
6 the CAPE HORN and CAPE GIRARDEAU had involved the same duties, and  
7 she had never experienced spasms or tingling in her hands on those  
8 vessels. Id. She began pausing periodically throughout the day to  
9 shake her arms and take a deep breath. Id. She also purchased an  
10 orthopedic pillow and a neck massaging appliance in an attempt to  
11 alleviate the symptoms. Id.

12           34. The bouts of spasms and tingling in Moore's hands  
13 worsened over time. Id. They occurred at unpredictable intervals.  
14 Id. Some days she would have no symptoms at all, while other days  
15 she experienced intense symptoms. Id.

16           35. On November 12, 2009, while lifting a pot, Moore  
17 felt a "spring" in her neck and experienced a ringing in her ear.  
18 Moore Test. She thought nothing of it at the time. Id.

19           36. The next morning, November 13, 2009, as Moore began  
20 trying to move food items from storage to the galley, she  
21 experienced a loss of control of her hands. Id. She was unable to  
22 lift anything. Id. She went back to her room but was unable to  
23 insert the key in the door lock. Id. She began to panic, thinking  
24 she was having a stroke, and called a friend who worked for MARAD  
25 to take her to the emergency room. Id.

26           37. Moore's friend took her to Alameda hospital, where  
27 she was diagnosed with an anxiety attack, given medication, and  
28 instructed to lie down and rest. Id. She returned to her cabin

1 aboard the ALGOL around 8 a.m. and slept until around noon. Id.  
2 When she awoke, her hands were still numb. Id. She again phoned  
3 her friend and this time was taken to Alta Bates Medical Center  
4 ("Alta Bates"). Id.

5 38. Upon arrival at the emergency room of Alta Bates,  
6 Moore was immediately admitted to the hospital. She was subjected  
7 to a series of testing and evaluations, primarily focusing on a  
8 neurological problem with her cervical spine and spinal cord. The  
9 report of neurologist Bradley Wrubel ("Wrubel"), who conducted the  
10 initial neurological consultation, noted that Ms. Moore had been  
11 having her symptoms for about one year, noted that the symptoms had  
12 now "become much worse" and noted that Moore complained of "a  
13 spasm-type sensation across the neck and shoulders ... associated  
14 with significant weakness" and a "burning type paresthesias" in the  
15 hands. Pl.'s Ex. 40.

16 39. Moore stayed at Alta Bates for several days for  
17 testing. Moore Test. An MRI revealed damage to her cervical spine  
18 consisting of "edema from C3-C7 and cord myelopathy from C4-C7."  
19 Pl.'s Ex. 41. Doctor Gordon Tang ("Tang") recommended that Moore  
20 undergo surgery to fuse several vertebrae together. Id. Moore was  
21 discharged from Alta Bates on November 16, 2009. Pl.'s Ex. 44.

22 40. Moore visited her primary care physician Dr. James  
23 Yoss ("Yoss") in late November 2009 to seek a second opinion as to  
24 whether fusion surgery was necessary. Moore Test. She told Yoss  
25 that she did not want to have surgery. Id. Yoss informed her that  
26 her condition was serious and could result in eventual paralysis if  
27 not treated. Id. Yoss referred Moore to a neurosurgeon, Dr. Brian  
28 Andrews ("Andrews") for an examination. Id. Andrews evaluated

1 Moore on December 8, 2009. Pl.'s Ex. 46. After reviewing the  
2 results of nerve conduction studies, Andrews recommended "a simple  
3 microsurgical C3 to C7 decompression without fusion." Id.

4 41. After weighing the risks, Moore agreed to the  
5 surgery recommended by Andrews. Moore Test. Andrews performed  
6 surgery consisting of C3-C7 "laminectomies and foraminotomies" on  
7 February 3, 2010. Pl.'s Ex. 48.

8 42. Moore experienced amelioration of her symptoms after  
9 the decompression surgery, but she continued to experience numbness  
10 in the fingers of her left hand and a raw sensation in the palm of  
11 her left hand. Moore Test. She related these symptoms to Andrews.  
12 Id.; Def.'s Ex. 529. She nevertheless informed him that she wanted  
13 to return to work as soon as possible. Moore Test. On May 18,  
14 2010, Andrews cleared her to return to work as a steward "on a  
15 trial basis." Andrews Test.; Def.'s Ex. 531. Andrews informed  
16 Yoss that he was permitting Moore to return to work but would  
17 continue to "monitor and document her further neurological recovery  
18 by seeing her in eight further weeks." Def.'s Ex. 531. He noted  
19 that she still complained of some numbness in her hand but that the  
20 numbness was "modest" and "partial." Id.

21 43. After being cleared by Andrews to return to work,  
22 Moore visited the office of her former union, the Seafarers  
23 International Union ("SIU"), to obtain a "fit for duty" slip.  
24 Moore Test. She was informed that she needed to phone the SIU  
25 headquarters. Id. Upon calling the SIU headquarters, Moore was  
26 informed that SIU doctors would not clear her to return to work.  
27 Id. Shortly thereafter, on June 10, 2010, Moore received a letter  
28 from Dr. Kenneth Miller of the SIU informing her that she had been

1 given the status of "Permanently Not Fit for Duty." Pl.'s Ex. 50.

2 44. Plaintiff was "devastated" upon learning that she  
3 would no longer be allowed to work as a merchant seaman. Moore  
4 Test. She has felt depressed ever since. Id.; K. Moore Test.<sup>9</sup>

5 45. Moore visited Andrews for a follow-up appointment on  
6 March 8, 2011, approximately one year after her decompression  
7 surgery. Def.'s Ex. 530. Andrews noted that "[s]he continues to  
8 have some numbness in the LEFT hand and both hands are aching to a  
9 degree. She denies any neck pain." Id. He stated that he would  
10 provide a "prescription for hand therapy if this is really all that  
11 can be offered for her residual hand complaints. She's not a  
12 candidate for further diagnostic tests or invasive treatments."  
13 Id.

14 46. Moore again visited Andrews on August 4, 2011.  
15 Def.'s Ex. 542. Andrews noted that since the March 2011 visit,  
16 Moore "has been increasingly troubled by spasms which occur in the  
17 hands." Id. The spasms were occurring several times per week,  
18 lasting up to twenty minutes at a time, and occurred in addition to  
19 the continued numbness in her fingertips and burning sensation in  
20 her left hand. Id. In a letter to Plaintiff's counsel, Andrews  
21 stated "I must believe that the patient's symptoms of hand spasms  
22 are related to her spinal cord which was decompressed along with  
23 the cervical nerve roots back in February 2010." Id. Andrews  
24 noted that he believed the spasms "will persist indefinitely into  
25 the future and it will afflict her quality of life[,] and any  
26 potential gainful employment might be compromised by the fact that

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27 <sup>9</sup> Moore's daughter, Kelly Moore ("K. Moore"), testified as to her  
28 mother's current difficulties.

1 she has these spasms[.]" Id.

2           47. Andrews, a neurosurgeon with extensive expertise in  
3 the area of neuro-trauma, and Plaintiff's treating physician for  
4 nearly two years, testified that the genesis of Moore's continuing  
5 hand spasms and numbness was the trauma to her spine caused by the  
6 lid of the freezer box striking her aboard the CAPE HORN. Andrews  
7 Test. Andrews testified that Moore may have had an underlying  
8 degenerative condition in her spine, but he found it improbable  
9 that her current symptoms would have arisen without trauma to her  
10 cervical spine such as that which resulted from the accident on the  
11 CAPE HORN. Id. He testified that spasms of the type Moore has  
12 endured are a "very common" reaction to spinal trauma. Id. He  
13 further explained that it was typical that her symptoms worsened as  
14 she engaged in increased physical activity by returning to work.  
15 Id.

16           48. Andrews further testified that, given Moore's  
17 current symptoms, it would be unsafe for her to resume work  
18 requiring manual labor, as her spasms could cause her to drop  
19 anything she happened to be carrying. Id. Moreover, jobs that  
20 involve repetitive use of the arms could cause her condition to  
21 worsen. Id. He testified that Moore was in "excellent health"  
22 with the exception of her spinal injury. Id. Andrews was not  
23 retained by Plaintiff as an expert and formed his opinions based on  
24 his treatment of Moore's injuries. Id.

25           49. Dr. Victor Prieto ("Prieto"), an orthopedic surgeon  
26 at St. Francis Memorial Hospital in San Francisco, was retained by  
27 Defendant to offer an opinion as to the cause of Moore's symptoms.  
28 Prieto Test. He met with Moore for "at most" thirty minutes. Id.



1 He opined that she has probably suffered from a degenerative,  
2 asymptomatic spinal condition for years and that the trauma to her  
3 neck from the freezer accident most likely rendered her condition  
4 symptomatic. Id.

5 **G. Plaintiff's Current Condition**

6 50. Plaintiff currently experiences spasms in her hands  
7 at unpredictable intervals "a couple times" per week. Moore Test.  
8 They cause her fingers to curl up and/or spread apart and freeze in  
9 such positions. Id.; Ex. 69 (photos of hands during spasms). The  
10 spasms are extremely painful with the pain extending into the  
11 forearms. Moore Test.

12 51. Moore has exhausted all of her savings, and her home  
13 is in foreclosure. Moore Test. She has filed for bankruptcy  
14 because she is unable to pay her remaining medical bills. Id. She  
15 is fearful of her medical and financial future and greatly misses  
16 her career as a ship steward. Id.; K. Moore Test.

17 **H. Damages**

18 52. As of June 10, 2010, Moore has been deemed  
19 permanently not fit for sea duty. Pl.'s Ex. 50. Based on  
20 vocational testing results, Moore's age, and Moore's education  
21 level, Vocational Rehabilitation Counselor Carol Hyland ("Hyland")  
22 opined that Moore could probably find employment in a customer  
23 service position. Hyland Test. Hyland opined that Moore would  
24 probably earn between twelve and fifteen dollars per hour and that  
25 she was more likely to find a part-time position than a full-time  
26 position. Hyland Test.; Pl.'s Ex. 65 ("Hyland Rep.").

27 53. Taking into account Moore's background, education,  
28 age, and gender, statistical work life tables regularly relied on

1 in the field of economics predict that Moore will work until age  
2 67.2. Moss Test.

3 54. Moore's annual earning capacity if she were to  
4 continue working as a Chief Steward would be \$76,571. Moss Test.<sup>10</sup>

5 55. Moore sustained losses, net of taxes and reduced to  
6 present value, of the following amounts:

7 a. Past lost earnings to time of trial of  
8 \$109,284. Pl.'s Ex. 66 ("Moss Rep.").

9 b. Future lost earnings, assuming part-time work  
10 at \$15 per hour, of \$168,830.<sup>11</sup> Moss Test.

11 56. Plaintiff has unpaid medical bills in the amount of  
12 \$26,009.27. Pl.'s Ex. 57.

13 57. In May 2010, Moore began receiving \$1688 per month  
14 in social security benefits. Def.'s Ex. 548.

15 58. As of July 1, 2010, Moore began receiving disability  
16 pension benefits from the SIU in the amount of \$376.88 per month.

17 Id.

18 59. Moore received the standard \$8.00 per day  
19 maintenance payments as provided in her union contract from the  
20 date of her injury on December 31, 2008 until she returned to work  
21 aboard the ALGOL in April 2009. Def.'s Ex. 509.

22 60. Moore has not received maintenance payments from the  
23 date she stopped working aboard the ALGOL on November 14, 2009

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24 <sup>10</sup> Plaintiff's economist Joanna Moss ("Moss") testified at trial as  
25 to Moore's economic damages.

26 <sup>11</sup> This figure assumes Plaintiff will work until age 67.2. It also  
27 assumes, based on Hyland's testimony, that Plaintiff will require  
28 six months of retraining during which she will earn no income, and  
that she will then work half-time at a wage of fifteen dollars per  
hour.

1 until she was cleared by Andrews to return to work on a trial basis  
 2 on May 18, 2010.<sup>12</sup> She seeks maintenance payments for this period  
 3 equal to \$8 per day for 185 days, a total of \$1480.

4 61. By virtue of being allowed to live aboard the ship  
 5 and eat all meals aboard the ship, Moore enjoyed approximately  
 6 \$8,000 per year (\$25 per day) in "found" benefits while working as  
 7 a chief steward. Moss Rep. According to Moss, Plaintiff has  
 8 suffered a past and future loss of these benefits totaling \$64,015.  
 9 Id.

### 11 **III. CONCLUSIONS OF LAW**

12 This case for personal injury damages against the United  
 13 States by a seaman employed on a MARAD vessel presents an admiralty  
 14 and maritime matter within the meaning of Rule 9(h) of the Federal  
 15 Rules of Civil Procedure, and is governed by the provisions of the  
 16 Clarification Act, 50 U.S.C. Appx. § 1291(a), which incorporates  
 17 the provisions of the Suits in Admiralty Act (SIAA), 46 U.S.C. §§  
 18 741-752.

19 Plaintiff asserts claims for unseaworthiness, negligence under  
 20 the Jones Act, and unpaid maintenance and cure.

#### 21 **A. Unseaworthiness**

22 A "warranty of seaworthiness" is a strict liability doctrine  
 23 that requires shipowners to furnish their crew with a vessel, and  
 24 appurtenances thereto, which are reasonably fit for their intended  
 25 use. Mitchell v. Trawler Racer, 362 U.S. 539, 550 (1960). The  
 26 burden of proving the unseaworthiness of a vessel rests with the

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28 <sup>12</sup> The parties agreed that Moore has not received maintenance  
 payments since leaving the ALGOL.

1 seaman plaintiff. Ramos v. Matson Navigation Co., 316 F.2d 128,  
2 131 (9th Cir. 1963). The plaintiff must also prove that the  
3 vessel's unseaworthiness was the proximate cause of his injuries.  
4 Id.

5 Here, the record is replete with evidence that the reefer  
6 space was not fit for its intended use. The hard tile surface did  
7 not meet the maritime industry's standards or the Tile Institute's  
8 standards for skid resistance. No rubber matting or non-skid  
9 stripping was in place on the reefer room floor. The floor was  
10 often wet due to the thawing of ice and frost that frequently  
11 accumulated along the bottom of the reefer boxes. The Non-  
12 Conformity Report noted that a smaller crew member, such as  
13 Plaintiff, "has to stand on something to gain the height" necessary  
14 to reach items at the bottom of the freezer boxes. Nevertheless,  
15 no step-ladders were provided for the reefer space despite requests  
16 from both Moore and Ali. Based upon these findings, the Court  
17 concludes that the reefer space was not fit for its intended use  
18 and was therefore unseaworthy.

19 Defendant contends that even if the reefer room was  
20 unseaworthy, the unseaworthiness was not the proximate cause of  
21 Plaintiff's injuries. Rather, Defendant contends that Moore's  
22 accident was simply and wholly the result of her own negligence.  
23 The Non-Conformity Report and PGM's letter in response to it belie  
24 this argument. They indicate that step ladders and non-skid  
25 stripping would likely have prevented the accident. The testimony  
26 of Fietz and Stoller further supports this conclusion.

27 Furthermore, the Court rejects Defendant's argument because it  
28 finds that Moore was not negligent at all. The Court finds

1 credible Moore and Ali's testimony that they requested step ladders  
2 and were not provided with them. It was not within Moore's job  
3 duties as Chief Steward to procure safety equipment. The Non-  
4 Conformity Report indicates that shorter crew members "ha[d] to"  
5 stand on something to access the freezer boxes. The Court finds  
6 that Moore did not act unreasonably under the circumstances by  
7 using the only means available to her to perform an act that she  
8 was ordered to perform.

9 The Court also rejects Defendant's contention that Moore  
10 disobeyed a direct order by attempting to access the items in the  
11 freezer. Even if Sharik instructed Moore that she was not to move  
12 the items, the Court finds that Moore's interpretation of this  
13 instruction -- that it was not meant to prohibit her from touching  
14 items in the freezer boxes in the course of performing the  
15 inventory that she had been ordered to perform -- was reasonable  
16 under the circumstances. Accordingly, the Court finds that Moore  
17 was not negligent and that the unseaworthiness of the CAPE HORN  
18 proximately caused Moore's accident.

19 The Court further finds, based on the testimony of Andrews as  
20 Moore's treating physician, that the accident on the CAPE HORN was  
21 the medical cause of the symptoms that have rendered her  
22 permanently unfit for duty. The Court notes that even Prieto,  
23 Defendant's medical expert, opined that Moore likely had a  
24 preexisting degenerative spinal condition, but that it was likely  
25 the freezer lid striking her head and neck that rendered the  
26 condition symptomatic.

27 Based on these findings, the Court concludes that Defendant is  
28 liable for unseaworthiness.

1           **B. Negligence under the Jones Act**

2           The courts have long held that seamen are "the wards of  
3 admiralty," and have liberally implemented their personal injury  
4 remedies to foster seamen's protection. Cortez v. Baltimore  
5 Insular Line, Inc., 287 U.S. 367, 377 (1932). Following this long-  
6 honored public policy in favor of seamen, the United States  
7 Congress in 1920 created the Jones Act negligence cause of action.

8           The elements of a Jones Act negligence claim are: duty,  
9 breach, notice, and causation. Ribitzki v. Canmar Reading & Bates,  
10 Ltd. P'ship, 111 F.3d 658, 662 (9th Cir. 1993). "The employer of a  
11 seaman owes the seaman a duty under the Jones Act to provide the  
12 seaman with a safe place to work." Id. For the same reasons the  
13 Court found the reefer room unseaworthy, the Court finds that  
14 Defendant breached its duty to provide Moore with a safe place to  
15 work. Moore has therefore proved the first two elements of her  
16 negligence claim. The next element of her claim is notice. An  
17 employer is only liable under the Jones Act if the employer or its  
18 agents either knew or should have known of the dangerous condition,  
19 in this case the slipperiness of the reefer room floor and the lack  
20 of any stepping stools in the area. The Court finds that Defendant  
21 knew of these dangers because both Moore and Ali voiced concerns to  
22 ship personnel. Lastly, under the Jones Act's "featherweight  
23 causation standard," Moore must demonstrate only "that [her]  
24 employer's negligence played any part, even the slightest, in  
25 producing [her] injury." Ribitzki, 111 F.3d at 664, 662 n.3 (9th  
26 Cir. 1993). The Court finds that Defendant's negligence in failing  
27 to provide Moore with a safe work space easily surpasses this  
28 slight causation standard.

1 Lastly as explained above, the Court finds that no comparative  
2 fault applies because Moore was not negligent.

3 **C. Primary Duty Rule and Discretionary Function Doctrine**

4 Defendant asserts that the "discretionary function exception"  
5 and the "primary duty rule" preclude a finding of liability in this  
6 case. The Court disagrees.

7 The discretionary function exception is a qualification to  
8 the general waiver of sovereign immunity granted by the Federal  
9 Tort Claims Act. Earles v. United States, 935 F.2d 1028, 1030 (9th  
10 Cir. 1991). The Ninth Circuit has held that the exception applies  
11 to the SIAA as well. Id. The exception states, in relevant part,  
12 that a claim cannot be maintained against the United States when  
13 that claim is "based upon the exercise or performance or the  
14 failure to exercise or perform a discretionary function or duty on  
15 the part of a federal agency or an employee of the Government,  
16 whether or not the discretion involved be abused." Id. (quoting 28  
17 U.S.C. § 2680(a)). Defendant argues that Plaintiff's suit falls  
18 within the exception because decisions involving the maintenance of  
19 reserve fleet vessels "are classic discretionary functions." ECF  
20 No. 41 ("Def.'s Trial Br."). Thus, according to Defendant, the  
21 government's waiver of sovereign immunity in the SIAA does not  
22 extend to the instant action.

23 The government bears the burden of proving that the  
24 discretionary function exception applies. GATX/Airlog Co. v.  
25 United States, 286 F.3d 1168, 1174 (9th Cir. 2002). The government  
26 must show that the challenged conduct -- here the failure to  
27 provide a safe reefer room -- involved some judgment, and that the  
28 judgment is the kind that the doctrine was designed to shield,

1 namely judgment subject to policy analysis. Id. Here, the Court  
2 finds that the government has not shown that the decision not to  
3 install non-skid stripping or rubber mats, and not to provide step-  
4 ladders in the reefer room of the CAPE HORN involved judgment based  
5 on policy analysis. The facts show that the lack of safety  
6 features in the reefer room was not due to a considered judgment or  
7 reasoned analysis at all. Rather, it was due to the lack of any  
8 such judgment or analysis, as no job hazard analysis or risk  
9 assessment of the steward's tasks in the reefer room was ever  
10 performed at all. Moreover, simple maintenance tasks such as  
11 purchasing a step ladder or installing non-skid stripping did not  
12 require agency review. There is simply no evidence that such  
13 measures were subject to policy analysis.

14 The "primary duty rule," established in Walker v. Lykes  
15 Brothers S.S. Co., 193 F.2d 772 (2d Cir. 1952), holds that a seaman  
16 who is injured as a result of his own breach of a duty to the  
17 shipowner to maintain a safe ship cannot recover for injuries  
18 caused by such breach. Reinhart v. United States, 457 F.2d 151,  
19 153-54 (9th Cir. 1972). The rule does not apply here because the  
20 evidence shows that it was not Moore's duty as Chief Steward to  
21 purchase equipment for the reefer room such as stepping stools,  
22 rubber mats, and non-skid stripping. Therefore, in no way was  
23 Moore's injury the result of her breaching any duty she owed the  
24 shipowner.

25 **D. Maintenance and Cure**

26 Under the doctrine of "maintenance and cure," a seaman who  
27 becomes ill or injured while in the service of his vessel is  
28 entitled to a per diem stipend for the cost of food and lodging on



land during the period of his or her convalescence, as well as payment for all medical expenses incurred. Vaughan v. Atkinson, 369 U.S. 527, 531 (1962). The shipowner's obligation to pay maintenance and cure extends during the period when the seaman is medically unfit to do a seaman's work and continues until he reaches maximum medical recovery. Id. "Maintenance" is a daily stipend due to a seaman during the period of his disability equivalent to the quality and value of food and lodging provided to him aboard the vessel. McWilliams v. Texaco, Inc., 781 F.2d 514, 517 (5th Cir. 1986). "Cure" is defined as the reasonable medical expenses for treatment until the seaman is fit for duty or until maximum recovery is reached. Vella v. Ford Motor Co., 421 U.S. 1, 5 (1975). All ambiguities as to maintenance and cure benefits are resolved in favor of the seaman. Id.

The record shows that Plaintiff received maintenance for her period of convalescence from December 31, 2008 until she returned to work in April 2009. She now seeks maintenance from November 13, 2009, the date she left the ALGOL, through May 18, 2010, the date Andrews released her to return to work on a trial basis. She also requests cure in the amount of her remaining unpaid medical bills. The Court finds that Plaintiff is entitled to the maintenance and cure she seeks. The record shows that she received medical treatment for her spinal injury from November 13, 2009, through May 18, 2010. She is therefore entitled to maintenance and cure during this 185 day period.

**E. Damages**

Based on the above findings, the Court concludes that Plaintiff is entitled to the following damages, net of taxes and

1 reduced to present value:

- 2 1. Past lost wages in the amount of \$109,284;
- 3 2. Future lost wages in the amount of \$168,830;
- 4 3. Past pain and suffering in the amount of \$150,000;
- 5 4. Future pain and suffering in the amount of \$50,000;
- 6 5. Maintenance payments totaling \$1,480;<sup>13</sup>
- 7 6. Cure in the amount of \$26,009.27;
- 8 7. Pre-judgment interest in the amount of four percent per
- 9 annum from the date Plaintiff filed this suit. 46 U.S.C.
- 10 § 30911(a).

11 The Court finds that Plaintiff is not entitled to recover for  
 12 lost "found" benefits equal to the value of her free lodging and  
 13 meals aboard the ship. The parties agreed that Defendant was not  
 14 required to provide her with these benefits while the ships were  
 15 moored. Allowing Plaintiff to recover for the loss of these perks  
 16 would allow her to augment her recovery purely based on Defendant's  
 17 generosity in allowing her to live aboard the vessel rent-free.

18 The Court also finds that Defendant is not entitled to a  
 19 credit for past or future Social Security or SIU pension benefits  
 20 Plaintiff has received or will receive. See United States v.  
 21 Hayashi, 282 F.2d 599, 603-604 (9th Cir. 1960) (government  
 22 tortfeasor not entitled to credit for Social Security benefits  
 23 received by plaintiff); Russo v. Matson Navigation Co., 486 F.2d  
 24 1018, 1021 (9th Cir. 1973) (improper to consider maritime pension  
 25 benefits in mitigation of damages owed to injured seaman).

26 ///

27 \_\_\_\_\_  
 28 <sup>13</sup> This amount is based on the union-negotiated rate of \$8 per day  
 for a period of 185 days.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court finds in favor of  
3 Plaintiff Donna Moore and against Defendant the United States on  
4 Plaintiff's claims for unseaworthiness, negligence under the Jones  
5 Act, and maintenance and cure. The Court awards Plaintiff damages  
6 in the amount of \$505,603.27 plus interest at the rate of four  
7 percent per annum from the date this suit was filed until the date  
8 of this Order.

9 Within ten (10) days of this Order, the parties shall  
10 stipulate to the amount of interest owed and file the stipulation  
11 with the Court.

12  
13 IT IS SO ORDERED.

14  
15 Dated: September 22, 2011

16   
17 UNITED STATES DISTRICT JUDGE  
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